IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

OHIO VALLEY ENVIRONMENTAL COALITION, INC., et al.,

Plaintiffs,

v. **Case No. 2:13-cv-21588**
(Consolidated with 2:13-cv-16044)

FOLA COAL COMPANY, LLC,

Defendant.

DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT
REGARDING INTERIM ATTORNEYS' FEES AND COSTS

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Defendant Fola Coal Company, LLC ("Fola") respectfully moves the court to alter or amend its Memorandum Opinion and Order (ECF No. 193) granting Plaintiffs' Motion for an Interim Award of Attorneys' Fees and Costs (ECF No. 183).

I. THE COURT SHOULD GRANT FOLA'S MOTION TO PREVENT MANIFEST INJUSTICE CAUSED BY PLAINTIFFS' FAILURE TO FULLY EXPLAIN THE REDUCTIONS MADE TO THEIR FEES AND EXPENSES

Rule 59(e) does not specify the circumstances in which a court should grant a motion to alter or amend a judgment, but the Fourth Circuit has stated that such a motion should be granted: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Bailes v. Erie Ins. Property & Casualty Co.*, No. 3:09-cv-146, 2010 WL 54577, at *1 (S.D.W.Va. Feb. 9, 2010) (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Here, the Court should grant Fola's motion to prevent manifest injustice caused by Plaintiffs' inadequate explanation for how it reduced its attorneys' fees and costs to account for the claims on which they did not prevail.

In its response brief, Fola protested that the explanation provided by Plaintiffs' counsel regarding the reductions made to their fees and expenses was vague. ECF No. 189 at 2-3. In their reply, Plaintiffs disagreed, claiming that Fola "[chose] to ignore" Plaintiffs' "carefully prepared information," which they claim adequately explains how those reductions were made. However, Plaintiffs' own reply brief demonstrates that their explanations were not detailed enough for Fola to meaningfully evaluate how Plaintiffs arrived at the reductions.

For example, Plaintiffs state in their reply brief that "OVEC applied a one-third reduction [to stream sampling expenses at Surface Mine No. 4A] because Dr. Swan took one biological sample at each site, Dr. Baker measured RBP once at each site, and the division of time during the sampling day was defined by three movements of personnel to three different mining sites. The proper reduction is therefore one-third, not one-half." ECF No. 192 at 5. However, Plaintiffs did not provide this explanation in their opening brief or supporting declarations, only in their reply brief. Mr. Hecker's declaration simply stated that he was excluding one-third of Dr. Swan and Dr. Baker's time and sample processing expenses without explaining why. ECF No. 183-1 at 7, ¶ 18.a.

Also in their reply brief, Plaintiffs argued that their explanations were not vague because they "provided detailed time sheets that show precisely how many hours were devoted to each task, and how many hours were reduced *on both a daily basis and task basis*." ECF No. 192 at 5 (emphasis in original). Plaintiffs have the burden of proving that their fees and expenses were reasonable. Fola should not be required to guess or draw inferences from time entries and their corresponding reductions, and should not be sandbagged by explanations provided, for the first time, in a reply brief.

II. MR. HECKER'S HOURLY RATE DOES NOT REFLECT PREVAILING MARKET RATES IN WEST VIRGINIA

Because Plaintiffs' initial explanation of their fee request was inadequate, Fola was handicapped in its ability to respond to Plaintiffs' motion. Lacking information from Plaintiffs, Fola responded by suggesting a simple reduction based on the number of claims successfully advanced by Plaintiffs. Because this simple fee reduction was substantial, Fola did not additionally question the rates sought by Plaintiffs' counsel. Now, however, Plaintiffs have more fully responded, providing additional information in their reply brief. This additional information, however, still does not justify the fee award sought by Plaintiffs. In particular, the fees sought by Mr. Hecker are too high, for the reasons discussed below.[1]

To determine whether an attorney's hourly rate is reasonable, the Court must look to prevailing market rates for similar services by lawyers of comparable experience and skill in the community in which the Court sits. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-86 (1989). Here, the relevant community is Charleston, West Virginia or Huntington, West Virginia.[2] Plaintiffs' counsel Mr. James Hecker practices in Washington, D.C., and he requested a rate of $450 per hour in this case. ECF No. 183-1 at 1 (¶ 4). Of the three attorneys representing Plaintiffs in this case, Mr. Hecker requested the highest hourly rate and billed the highest number of hours. ECF No. 184 at 7-8.

[1] The Fourth Circuit has held that when considering a Rule 59(e) motion, a "district court has discretion to consider new arguments in some circumstances." *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007).

[2] It is unclear from the caselaw whether the relevant community is Charleston, where the headquarters for the U.S. District Court for the Southern District of West Virginia is located, or Huntington, the Division to which this case was assigned.

Courts should only consider rates charged by attorneys in other communities when it is reasonable to retain an attorney from outside the community because there are no local attorneys available with the relevant skills and expertise for the particular case. *Allen v. Monsanto Co.*, No. CIV A 205-578, 2007 WL 1859046, at *2 (S.D.W.Va. June 26, 2007); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994); *Marks Const. Co. v. Huntington Nat'l Bank*, No. 1:05-cv-73, 2010 WL 3418329, at *11 (N.D.W.Va. Aug. 27, 2010). That is clearly not the case here. There are obviously capable attorneys located in West Virginia who could represent Plaintiffs in this case, given that two such attorneys were also retained (Mr. Becher and Mr. Lovett). It was not reasonable for Plaintiffs to hire a Washington, D.C. attorney who is requesting the highest rate and who billed the most hours of the three attorneys retained by Plaintiffs.

This is particularly true given the fact that Mr. Hecker participated very minimally, if at all, in the depositions and at trial in this case. For the type of work Mr. Hecker performed—primarily research and writing—a more appropriate rate would be the rate requested by Mr. Becher (who did participate in depositions and at trial). Applying Mr. Becher's rate ($260 per hour) to Mr. Hecker's compensable hours (525.49) results in a fee of $136,627.40, rather than the $236,470.50 awarded by the Court, a difference of $99,843.10. ECF No. 193 at 8.

III. CONCLUSION

For the foregoing reasons, the Court should alter or amend its Memorandum Opinion and Order by reducing the total attorneys' fees awarded to Plaintiffs by $99,843.10.

Respectfully submitted,

FOLA COAL COMPANY, LLC

By counsel

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CERTIFICATE OF SERVICE

I, Jennifer L. Hughes, hereby certify that on May 30, 2017, I electronically filed the foregoing *Defendant's Motion to Alter or Amend Judgment Regarding Interim Attorneys' Fees and Costs* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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